IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	MDL No. 1917
	Case No. C-07-5944-SC
This Order Relates To: Case No. C-11-6397 SC COSTCO WHOLESALE CORP., Plaintiff, v. HITACHI LTD., et al, Defendants.	ORDER GRANTING IN PART AND DENYING IN PART THE PHILIPS DEFENDANTS' MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Now before the Court is the motion of Defendants Koninklijke Philips N.V. ("KPE") and Philips Electronics North America Corporation ("PENAC") (collectively the "Philips Defendants") to compel arbitration against Plaintiff Costco Wholesale Corporation ("Plaintiff"). ECF No. 1735 ("Mot."). The matter is fully briefed, ECF Nos. 2021 ("Opp'n"), 2217 ("Reply"), and appropriate for resolution without oral argument per Civil Local Rule 7-1(b). For the reasons explained below, the Court GRANTS in part and

DENIES in part the Philips Defendants' motion.

II. BACKGROUND

This matter is related to the Cathode Ray Tube ("CRT") Antitrust Multi-District Litigation ("MDL"), which involves allegations of a worldwide antitrust conspiracy to fix prices on cathode ray tubes and related products. Plaintiff had been a member of the MDL direct purchaser plaintiffs' class action, but it opted out to pursue its own claims. The opt-out case was transferred to this Court, as part of the MDL, on December 6, 2011. No. 11-cv-06397-SC, ECF No. 4 ("Conditional Transfer Order"). Plaintiff's complaint alleges that the Philips Defendants, along with the other defendants named in the case, "formed an international cartel that conducted a conspiracy . . . for the purpose and to the effect of raising or maintaining prices and reducing capacity and output for cathode ray tubes." Compl. ¶ 1. Plaintiff's complaint includes claims under federal and state antitrust laws. Id. ¶¶ 174-201.

Underlying the present matter is an arbitration clause in the so-called Vendor Agreement between Plaintiff and the Philips Consumer Electronics Corporation ("PCEC"), a division of PENAC. ECF No. 1736 ("Koons Decl.") Ex. A. The Vendor Agreement with PCEC incorporates by reference Plaintiff's "Standard Terms," which include the following provision on arbitration:

> All claims and disputes that (1) are between Vendor [the Philips Defendants] and PriceCostco[1] and (2) arise out of or relate to these Standard Terms or any agreement between Vendor and PriceCostco or to

[1] The Standard Terms use "PriceCostco" to refer to Plaintiff.

> their performance or breach (including any text or statutory claim) . . . shall be arbitrated under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in English at Seattle, Washington . . . Notwithstanding the above, PriceCostco or Vendor may bring court proceedings or claims against each other (i) solely as part of separate litigation commenced by an unrelated third party . . . .

Koons Decl., Ex. B, ¶ 20.

The parties make much of this particular motion's procedural posture. The Philips Defendants originally filed it on May 9, 2013, in the alternative to an August 17, 2012 motion to dismiss claims asserted by the Direct Action Plaintiffs' ("DAPs"), including Plaintiff. ECF No. 1668. At that time, a court-appointed Special Master oversaw certain motion practice in this case. On May 2, 2013, the Special Master recommended that the Court grant the motion to dismiss, but in advance of their motion to adopt those recommendations, Plaintiff and the Philips Defendant stipulated to resume briefing on the motion to compel arbitration only after the Court's ruling on the Special Master's recommendations regarding the motion to dismiss the DAP claims. ECF No. 1699. On August 21, 2013, the Court granted in part and denied in part the motion to dismiss, ECF No. 1856, leaving undisturbed Plaintiff's claims against the Philips Defendants, so the parties resumed briefing on the motion to compel arbitration pursuant to their stipulation.

This timeline is a point of contention in the parties' present motion because, throughout 2012, the Philips Defendants engaged in discovery related to Plaintiff's November 14, 2011 opt-out complaint. Specifically, the Philips Defendants served Plaintiff with interrogatories and document requests, and also deposed one of

Plaintiff's key witnesses. As this discovery was ongoing, the Toshiba Defendants, who had joined in the Philips Defendants' discovery requests, moved on August 24, 2012 to compel arbitration against Plaintiff, relying on the same Vendor Agreement and Standard Terms now at issue. See ECF No. 1332. The Court granted the Toshiba Defendants' motion on January 28, 2013.

Defendants changed their discovery strategy on January 10, 2013, requesting that Plaintiff produce Vendor Agreements and other contracts containing arbitration provisions. Plaintiff contends that the Philips Defendants must have known about such contracts all along, given the Toshiba Defendants' motion, Plaintiff's significant business relationship with the Philips Defendants (including three separate updates to the Vendor Agreements since the first one in 1995), and their Rule 30(b)(6) deposition of Plaintiff's witness. But the Philips Defendants maintain that they did not obtain for themselves copies of the relevant arbitration provision until February 11, 2013, and that the earliest they had learned of the possibility of arbitration was in December 2012, during the Rule 30(b)(6) deposition. Plaintiffs contend that the Philips Defendants have engaged in gamesmanship, deliberately delaying their motion to compel arbitration while pursuing discovery and their motion to dismiss. This, according to Plaintiffs, constitutes a waiver of the Philips Defendants' opportunity to compel arbitration.

The Philips Defendants disagree. The Philips Defendants also ask the Court to dismiss Plaintiff's claims for joint and several liability.

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III. LEGAL STANDARD

Section 4 of the Federal Arbitration Act ("FAA") permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for any order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. The FAA embodies a policy that generally favors arbitration agreements. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Federal courts must enforce arbitration agreements rigorously. See Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008). Courts must also resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989). These policies all "appl[y] with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

IV. DISCUSSION

The parties' dispute mainly concerns whether the Philips Defendants waived their right to compel arbitration. The Court finds that they did not.

Given the FAA's arbitration-friendly standards and the fact that courts must vigorously enforce arbitration agreements, Moses, 460 U.S. at 24-25, "[w]aiver of a contractual right to arbitration is not favored." Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986); Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., 572 F.2d 1328, 1330 (9th Cir. 1978)). Accordingly,

"any party arguing waiver of arbitration bears a heavy burden of proof." Id. "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." Id. (citing Shinto Shipping, 572 F. 2d at 1330)). The Court's analysis of these three factors must be undertaken in light of the strong federal policy in favor of enforcing arbitration agreements. Id. (citing Moses, 460 U.S. at 24-25).

A. Knowledge of an Existing Right to Compel Arbitration

Plaintiff contends that the Philips Defendants had knowledge of their arbitration right long before they filed their motion in May 2013. Plaintiff notes that the first Vendor Agreement between Plaintiff and the Philips Defendants was signed in 1995, and that the Philips Defendants must also have received three separate revisions to the Standard Terms in 1997, 2000, and 2004. Opp'n at 7-8 (citing ECF No. 2022 ("Shavey Decl.") ¶¶ 5-6).

Further, Plaintiff contends that the Philips Defendants should have been on notice of their Vendor Agreements with Plaintiff -- a major customer of the Philips Defendants for many years -- at least by 2010, when Plaintiff produced transactional data pursuant to a third-party subpoena in the Indirect Purchaser Plaintiffs' case. See Opp'n at 8 (citing ECF No. 2024 ("Weiss Decl.") Ex. A). The Philips Defendants must have known of this data, according to Plaintiff, since they referenced and received it several times between 2010 and 2012. Id. Given the existence of the Vendor Agreements and the revised terms, the discovery requests, and the

Toshiba Defendants' motion to compel arbitration, Plaintiff submits that the Philips Defendants cannot credibly state that they were unaware of a basis for compelling arbitration until the February 2013 production of the actual Vendor Agreement.

The Philips Defendants claim that they searched diligently for arbitration-related documents after the Toshiba Defendants' motion was filed, and after the Rule 30(b)(6) deposition. Reply Ex. 1 ("Malaise Decl.") ¶¶ 7-8. They state that any delay would be reasonable given the Philips Defendants' exit from the CRT business before Plaintiff ever filed a complaint. Reply at 5-6 (citing Malaise Decl. ¶ 11 & Ex. A at 6). Since the Philips Defendants did not have the actual Vendor Agreement in hand until early 2013, they argue that they could not reasonably have moved to compel arbitration despite their existing business relationship with Costco and the Toshiba Defendants' earlier motion to compel arbitration. Id. at 5-6. Further, the Philips Defendants contend that Plaintiff should be estopped from asserting this line of argument, since they filed their complaint instead of pursuing arbitration (despite apparently knowing of the agreement). Id. at 6.

The Court finds that this Fisher factor favors the Philips Defendants. The facts show that the Philips Defendants may have had a hint of the possibility of an arbitration clause in some agreement with Plaintiff, but they also appear to have been genuinely unsure of whether such an arbitration provision applied to their dispute with Plaintiff, and in any event, there appears to be no dispute that Plaintiff did not actually produce the relevant Vendor Agreement until February 2013. These facts do not merit a

finding of preexisting knowledge. Fisher, 791 F.2d at 694.

B. Acts Inconsistent with an Existing Right

Plaintiff argues that the Philips Defendants' pursuit of discovery and a motion to dismiss -- the "machinery of litigation" -- was inconsistent with an existing right to arbitration, and the Court should find waiver. Opp'n at 10-12. In support of this argument, Plaintiff cites an array of out-of-circuit authority, and relies heavily on the "scope and frequency" of the Philips Defendants' discovery requests and responses, as well as their Rule 30(b)(6) deposition. See id. The one Ninth Circuit case Plaintiff cites in support of its waiver argument, Van Ness Townhouses v. Mar Industries Corp., 862 F.2d 754, 758 (9th Cir. 1988), states that significant delays may indicate an intent to waive arbitration rights. Specifically, in that case, the moving party had waited two years to file its motion to compel. Id. Worse, it had filed its motion after the trial's originally scheduled start date. Id.

The Court finds that the Philips Defendants have not shown behavior inconsistent with an intention to arbitrate. First, the Philips Defendants filed their motion in May 2013, very soon after their receipt of the Vendor Agreement. See Van Ness, 862 F.2d at 758. It is true that Plaintiff filed its complaint nearly eighteen months before the Philips Defendants moved to compel arbitration, see Opp'n at 16, but given the circumstances surrounding the complexity of this action and the Philips Defendants' late receipt of the actual Vendor Agreements, the Court finds this fact uncompelling.

Second, the Philips Defendants filed their motion within a year of their serving discovery requests on Plaintiff and well in

advance of this case's scheduled 2015 trial date. See id. Compared to Van Ness, this is no great delay.

Third, as in the In re TFT-LCD MDL, the Philips Defendants are just one group among many defendants in a complex MDL, just as Plaintiff is one of numerous plaintiffs. See No. M 07-1827 SI, 2011 WL 2650689, at *7-8 (N.D. Cal. July 6, 2011). This counts against finding that the Philips Defendants' participation in litigation indicates their intent not to arbitrate. See id.

Finally, the Ninth Circuit has made clear that filing a motion to dismiss is not sufficient to constitute a waiver of the right to compel arbitration. See Sovak v. Chugai Pharma. Co., 280 F.3d 1266, 1270 (9th Cir. 2002). The Philips Defendants' reasonable discovery activities, in addition to their motion to dismiss, do not push this case over that bar. See Kingsbury v. U.S. Greenfiber, LLC, No. CV 08-00151 AHM, 2012 WL 2775022, at *3 (C.D. Cal. June 29, 2012) ("[I]f a party lacks knowledge of an existing right to arbitrate then even extensive litigation conduct is not inconsistent with its arbitration rights."). The Philips Defendants have not even answered the complaint yet. See In re TFT-LCD, 2011 WL 2650689, at *8. And the Standard Terms clearly require a written waiver requirement, further cutting against a finding of implicit waiver. Id.

Taking all of these facts together, the Court finds that the second Fisher prong weighs against finding waiver.

C. Prejudice

Finally, even if the Court had found that the Philips Defendants knew of their arbitration right and acted inconsistently with it, Plaintiff would have to show that it was prejudiced as a

result. Factors involved in the prejudice analysis include delay in filing the motion to compel and the costs and expenses incurred in litigation. See Brown v. Dillard's, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005). The Ninth Circuit has indicated that if there is no showing of prejudice, there will likely be no waiver of arbitration rights. See Sovak, 280 F.3d at 1270; In re TFT-LCD, 2011 WL 2650689, at *8.

Plaintiff claims that it has been prejudiced by the Philips Defendants' actions because (1) it has had to spend time and money defending against the motion to dismiss before both the Special Master and the Court; (2) responding to discovery has been burdensome; and (3) the Philips Defendants moved for arbitration in the alternative to their motion to dismiss, suggesting that their motive was gamesmanship because they only wanted to pursue arbitration if they lost on their motion to dismiss. See Opp'n at 13-17.

The Court does not find these arguments compelling. First, as the Philips Defendants note, they would have remained in the case to seek dismissal of Plaintiff's joint and several liability claims, so Plaintiff would have had to respond to a motion to dismiss at some point, regardless of the motion to compel arbitration. Moreover, since the Philips Defendants were not the only parties on that motion, it does not appear that Plaintiff was unduly burdened in handling it. Second, the Court does not find that Plaintiff has been unduly burdened in responding to discovery, since -- as with the motion to dismiss -- the profusion of parties to this case guarantees that Plaintiff would have had to comply with discovery requests and otherwise engage in litigation. See In

re TFT-LCD, 2011 WL 2650689, at *8 (finding similarly). This is particularly salient because the plaintiffs and defendants in this huge, long-running case are so interconnected. Third, the Court does not find Plaintiff's accusation of gamesmanship relevant or convincing under these circumstances. The Philips Defendants' filing their motion to compel in the alternative is not impermissible, especially since they filed it before the Court had ruled on the motion to dismiss and after the Special Master recommended that it be granted. This does not suggest that the Philips Defendants were attempting to cheat the system.

Considering these three factors together, the Court finds that Plaintiff has failed to carry the heavy burden of proving that the Philips Defendants waived their right to arbitration, especially considering the strong federal policy of enforcing arbitration agreements in the field of international commercial disputes.

However, as in its ruling on the Toshiba Defendants' motion to compel arbitration, ECF No. 1543 ("Toshiba Order"), the Court declines to dismiss Plaintiff's claims for co-conspirator or joint and several liability at this time. Those claims are outside the scope of the present arbitration agreement. See Moses, 460 U.S. at 20 ("[F]ederal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."); see also Toshiba Order at 5 (adopting Special Master's R&R that co-conspirator or joint and several liability claims are not subject to arbitration in this case).

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V. CONCLUSION

As explained above, the Court GRANTS the Philips Defendants' motion to compel arbitration, with the exception of Plaintiff's claims for co-conspirator or joint and several liability based on Plaintiff Costco's purchase of products from defendants other than the Philips Defendants. To that extent, the motion is DENIED.

IT IS SO ORDERED.

Dated: December 13, 2013

UNITED STATES DISTRICT JUDGE